SUPREME COURT, U. S.
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No. 845

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

CONTINENTAL BAKING COMPANY, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR CONTINENTAL BAKING COMPANY TO BRIEF IN OPPOSITION

JOHN H. SCHAFER
JAMES V. SIENA
701 Union Trust Building
Washington, D. C.
Counsel for Continental Baking Company

Of Counsel:

ROY M. ANDERSON
GORDON A. THOMAS
Haslet Avenue
Rye, New York

COVINGTON & BURLING
701 Union Trust Building
Washington, D. C.

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Respondent's opposition both avoids the issues and misstates the record.

The issue is not whether the Commission had "jurisdiction". Continental has never questioned Commission jurisdiction to determine whether there was the violation alleged. The question at the Commission level was whether the acts and practices complained of were

both "unfair" and "in commerce" and, if so, what kind of order should be issued in the exercise of Commission discretion. The question before the court of appeals was whether the terms of the Commission's order could be affirmed on the grounds relied upon by the Commission in issuing it. The issues before this Court are whether the court of appeals' action in affirming the terms of the Commission's order without reaching grounds relied upon by the Commission in issuing it is consistent with *SEC* v. *Chenery Corp.*, 318 U.S. 80, and, secondly, whether the ground relied upon by the court in affirming the order is not precluded by *FTC* v. *Bunte Bros., Inc.*, 312 U.S. 349.

Respondent attempts to avoid dealing with the court's errors under *Chenery* and *Bunte* by urging that the Commission held that "significant sales in interstate commerce were made pursuant to the price fixing conspiracy" and that this holding was affirmed by the court of appeals. (R. Br. 5).

Even had both the Commission and court in fact so held, the latter's decision could not stand under *Chenery*. It is indisputable that the Commission found it "necessary" to its decision not to rest on, but to go beyond, those sales in interstate commerce. (Petition, App. 31a). Indeed, pursuant to this determination the Commission went through an elaborate official notice proceeding before issuing its order. It is flatly inconsistent with *Chenery* for a court of appeals to affirm agency action without even reaching the point that the agency both explicitly said, and unequivocably showed by its actions, was "necessary" to its decision. Nothing in the brief in opposition even touches on this point, or suggests any reason why summary reversal on this ground is not appropriate.

In addition, respondent's attempt to avoid the *Bunte* rule by urging that the Commission and the court found that "significant sales in interstate commerce were made pursuant to the price fixing conspiracy" is flatly contradicted by the opinions below. There was no finding made by the Commission that prices on sales to Alaska were fixed "pursuant to" the broad conspiracy alleged, and respondent's brief significantly never cites any. The limits of the Commission finding were recognized by the court of appeals, which stated only that the local conspiracy "affected" some interstate sales. (Petition, App. 4a). The court never suggested there was either a finding or evidence that Alaska prices were fixed "pursuant to" that local conspiracy.[1] As we have shown in our Petition, *Bunte* precludes the issuance of a Commission order on the basis of acts which merely "affected" commerce.

In summary, petitioner has been confronted with a different contention at every stage of this proceeding. The Commission found that it was "necessary" to adopt an extraordinary official notice proceeding in order to supplement the record then before it to justify the broad, nationwide order it determined to issue. The court of appeals avoided all of the legal defects in the Commission's action by affirming the order on the grounds that the unfair acts alleged had "affected" some interstate sales. This ground for affirmance, in turn, was legally indefensible under both *Chenery* and *Bunte*. To avoid these defects respondent now at-

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[1] The lack of record evidence that the charged conspiracy had anything to do with Alaska establishes what is obvious anyway: that the local retail bakeries in the Seattle market making up this alleged conspiracy had no interest whatever in sales or prices to Alaska. There is no Commission finding to the contrary.

tempts to re-write all of the prior proceedings by arguing without record support that both the Commission and the court of appeals found that prices to the Alaskan trade were fixed "pursuant to" the local conspiracy alleged. It is incumbent upon this Court to require the court of appeals to address itself to the grounds relied upon by the Commission.

CONCLUSION

We again respectfully urge that the errors of the court of appeals are so plain that this Court should summarily reverse and remand the case. In any event, a writ of certiorari should be issued.

Respectfully submitted,

JOHN H. SCHAFER
JAMES V. SIENA
701 Union Trust Building
Washington, D. C.
Counsel for
Continental Baking
Company

Of Counsel:

ROY M. ANDERSON
GORDON A. THOMAS
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